UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPS SUPPLY CHAIN SOLUTIONS, INC.

and Case 12-CA-144578

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 769

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTION TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (the General Counsel) files the following Answering Brief to Respondent's Cross-Exception to the Administrative Law Judge's Decision.

I. STATEMENT OF THE CASE

In her December 2, 2015 Decision, Administrative Law Judge Donna Dawson (ALJ Dawson) found that UPS Supply Chain Solutions, Inc. (Respondent) lawfully implemented changes to the 2015 health benefits of the unit of warehouse employees of Respondent at its Doral, Florida facility, while in the midst of negotiations with International Brotherhood of Teamsters, Local Union No. 769 (the Union) for a first collective-bargaining agreement. (ALJD 22:11-16). In reaching this conclusion, ALJ Dawson found Respondent provided appropriate notice and opportunity to bargain; Respondent did not fail to bargain in good faith; that Respondent's failure to remedy unilateral changes to the 2014 health benefits of the unit employees that had been found unlawful by ALJ Ira Sandron in Case 12-CA-113671 (currently pending before the Board) did not taint the bargaining process regarding the 2015 health benefit

changes; and that Respondent lawfully implemented the 2015 health benefit changes after the parties bargained to a valid impasse. (ALJD 17:26-22:16).

On February 4, 2016, Counsel for the General Counsel filed exceptions to ALJ Dawson's Decision and a supporting brief. On February 18, 2016, Respondent filed an answering brief to General Counsel's exceptions, a motion to Strike General Counsel's exceptions, and its cross-exception to the Decision of the ALJ Dawson.

II. RESPONDENT'S CROSS EXCEPTION

Respondent filed a single cross-exception to ALJ Dawson's denial of its application to preclude General Counsel from asserting a theory of violation in this case based upon the prior unremedied unfair labor practice in Case 12-CA-113671, and allowing General Counsel to assert that theory. Respondent contends that General Counsel did not litigate that theory at the hearing in this matter.

Contrary to Respondent's assertion, from the outset of the litigation of this case, Respondent was on notice about this theory because paragraph 6(h) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by insisting that the Union accept Respondent's only proposal for changes to health benefits for employees in the Unit to take effect on January 1, 2015, failing and refusing to negotiate about the Union's bargaining proposals regarding health benefits for employees in the Unit to take effect on January 1, 2015, and implementing those changes on January 1, 2015, without affording the Union an opportunity to bargain with Respondent with respect to this conduct, without first negotiating an initial collective-bargaining agreement with the Union, and without first bargaining with the Union to a good-faith impasse, **notwithstanding that it has not remedied changes it made to the health benefits of employees in the Unit that were implemented on January 1, 2014, in violation of**

Section 8(a)(1) and (5) of the Act, as found by an Administrative Law Judge on November 28, 2014, in Case 12-CA-113671. [GCX 1(d) at p.4, emphasis added].[1]

Respondent was also on notice of this theory of violation because paragraph 6(i) of the Complaint alleges that by its **overall conduct, including the conduct described above in paragraph 6(h),** Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Union, in violation of Section 8(a)(1) and (5) of the Act. [GCX 1(d) at p.4, emphasis added]. Before trial, in its answer to the Complaint, Respondent denied paragraphs 6(h) and 6(i) of the Complaint and thus joined these issues. [GCX 1(f) at p. 3-4].

At no time did General Counsel withdraw the allegations in paragraphs 6(h) and 6(i) of the Complaint, or any other portion of the Complaint. Respondent counsel's purported understanding of General Counsel's position does not negate the plain language of the complaint.

In view of the plain language of the complaint there was no requirement that General Counsel expand on the theory of the case, or cite *Dynatron/Bondo*,[2] *Alwin*,[3] or other case law in advance of litigation, as Respondent suggests. Nor is General Counsel required to restate at the hearing the allegations that are already in the complaint.

In its brief, Respondent conveniently omitted the portion of General Counsel's opening statement specifically referencing Respondent's failure to remedy the unfair labor practices in Case 12-CA-113671:

> On November 28, 2014, in Case 12-CA-113671, an ALJ found that, on January 1st, 2014, the Respondent implemented changes to the health benefits of the unit employees, in violation of Section 8(a)(1) and (5) of the Act. Respondent has yet to remedy the unfair labor practices found by the ALJ.

[1] As used herein "Tr." is a reference to the transcript, following by the page and/or line numbers; "GCX" is a reference to General Counsel's exhibits.
[2] 333 NLRB 750 (2001).
[3] 326 NLRB 646 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999).

(Tr. 15:19-23). Thus, General Counsel consistently relied on both this fact and the totality of the bargaining regarding the 2015 health benefits changes Respondent sought to establish the alleged unfair labor practices.

The cases cited by Respondent, *Sierra Bullets, LLC*, 340 NLRB 242 (2003) and *Buonadonna Shoprite, LLC*, 356 NLRB No. 115 (2011), are clearly inapposite. In *Sierra Bullets*, the Board found that the General Counsel expressly relied on the narrow theory that the employer violated Section 8(a)(5) of the Act by implementing its final offer because the employer had not provided information the union had requested during bargaining. 340 NLRB at 242. In *Buonadonna Shoprite*, the complaint simply alleged a straightforward denial of an employee's request to be represented by the union during an investigatory interview, and there was no allegation in the complaint or stated at the hearing by General Counsel supporting the ALJ's finding that even though a union representative was available to represent the employee, the employer had unlawfully failed to permit the employee to call a *second* union representative before the investigatory interview. In contrast, in the instant case, as noted above, the complaint broadly alleges that Respondent's overall conduct in bargaining about health benefits and the unilateral changes therein violate the Act. The complaint further alleges the fact that Respondent had not remedied the unfair labor practices in Case 12-CA-113671 as factor establishing this violation of the Act. Moreover, at no point in this litigation – not in the complaint, at the hearing, or in General Counsel's post-hearing brief to ALJ Dawson - has the General Counsel stated that we are relying on a narrow theory of violation or promised to forego any particular fact or theory in support of the allegation that Respondent unlawfully unilaterally changed 2015 health benefits of unit employees.

In summary, from the outset of the litigation in this case Respondent has been on notice of the fact that General Counsel relies, in part, on the unremedied unfair labor practices found by ALJ Sandron in Case 12-CA-113671, in support of the allegations that in the instant case its negotiations and implementation of health care changes in 2015 are unlawful. The complaint put Respondent on notice of the theory of violation which it erroneously claims was first argued in the brief. It has long been held that:

> [t]he Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is a plain statement of the things claimed to be an unfair labor practice that respondent may be put upon his defense. (citing cases).

American Newspaper Publishers Assn. v. NLRB, 193 F.2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100 (1953). Section 102.15 of the Board's Rules and Regulations require only that the complaint include "a clear and concise description of the acts which are claimed to constitute unfair labor practices," not that it include the legal theory relied on. General Counsel is not required to precisely state, either in the complaint or at trial, the theory upon which he intends to proceed under the Act. Thus, the Board has held that where a complaint broadly alleges a particular violation of the Act it places in issue any matter related to the alleged unlawful conduct, and meets due process requirements. *Whirlpool Corporation*, 337 NLRB 726, 727 (2002); see also *Pergament United Sales*, 296 NLRB 333, 334-335 (1989), enfd. 920 F.2d 130, 136 (2nd Cir. 1990); *Davis Supermarkets v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993).

Respondent also protests that the ALJ precluded it from introducing evidence about its claimed good faith negotiations for a first collective-bargaining agreement that were separate from the parties' negotiations about the changes it intended to impose for 2015 health benefits. However, Respondent was permitted to elicit testimony that a couple of tentative agreements on

non-healthcare issues were reached in separate negotiations for a contract. (Tr. 136-139). Although there is a cryptic reference to a Respondent Exhibit 2 by Respondent's counsel, that was apparently a purported tentative agreement (Tr. 132), Respondent never identified on the record precisely what the document was and the record does not reflect that it was actually marked for identification or offered in evidence. In addition, Respondent never asked the ALJ to place any such document or other tentative agreements in a rejected exhibit file. (Tr. 132-139).

In any event, as General Counsel argued at the hearing, Respondent did not establish the relevance of the fact that a couple of tentative agreements were reached with respect to non-health care issues, during the lengthy two year period during which the parties have bargained without reaching a first contract and without even progressing to the discussion of economic issues (with the exception of the discrete bargaining over the 2015 healthcare changes in September and October 2014). (Tr. 135).

In addition, at trial Respondent effectively conceded that in negotiations with the Union about 2015 health care changes, it consistently took the position that the negotiations should be limited to the health care issue. Thus, attorney Rodriguez, Respondent's chief spokesperson in negotiations with the Union, testified that when, during negotiations about Respondent's proposed 2015 health benefits changes on October 17, 2014, the Union proposed a wage increase and mentioned the need to discuss pension benefits in conjunction with negotiations about health benefits, Respondent did not want to discuss economics in general. Rodriguez admitted that Respondent rejected the Union's wage increase proposal and there is no evidence that Respondent made a counteroffer. (Tr. 184-187). Finally, in its cross-exception, Respondent failed to specify any additional evidence it would have introduced regarding the very lengthy and to date unsuccessful negotiations for an initial collective-bargaining agreement.

In summary, Respondent failed to establish a basis for excepting to the ALJ's evidentiary rulings regarding bargaining for an initial contract.

III. CONCLUSION

For the reasons detailed above, Counsel for the General Counsel respectfully submits that the Board should deny Respondent's cross-exception.

Dated at Miami, Florida this 3rd day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Answering Brief to Respondent's Cross-Exception to the Decision of the Administrative Law Judge in the matter of UPS Supply Chain Solutions, Inc., Case 12-CA-144578, was electronically filed with the Executive Secretary of the National Labor Relations Board and served by electronic mail upon the below-listed parties on this 3rd day of March, 2016, on the following persons:

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